

STATE OF MICHIGAN
COURT OF APPEALS

LITITIA BOND, Personal Representative of the
Estate of NORMA JEAN BLOCKER, Deceased,

UNPUBLISHED
March 3, 2009

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

ADAM COOPER, M.D., KRISTEN MCDANIEL,
D.O., and BOTSFORD GENERAL HOSPITAL,

No. 273315
Oakland Circuit Court
LC No. 2005-066794-NH

Defendants-Appellees.

ON REMAND

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

This case is on remand from the Supreme Court. In an order, the Court vacated the prior opinion and remanded this case to address “the sufficiency of the plaintiff’s notice of intent to file suit under MCL 600.2912b(4) and *Boodt v Borgess Medical Center*, 481 Mich 558 [; 751 NW2d 44] (2008).”¹ In light of the *Boodt* ruling, we affirm the trial court’s grant of summary disposition in favor of defendants.

Drs. Cooper and McDaniel admitted the decedent to defendant hospital where a total abdominal hysterectomy and bilateral salpingoopherectomy was performed. Following the surgery, the decedent complaint of low back pain and had a decreased urinary output and no bowel movement. Despite these complaints, the decedent was discharged from the hospital. Three days later, the decedent returned to the hospital complaining of acute abdominal pain. She was diagnosed with ischemic bowel and underwent an exploratory laparotomy, which was performed by Dr. Cooper and Dr. Michael Rebock. A subtotal colectomy with end ileostomy

¹ *Bond v Cooper*, 482 Mich 1028; ___ NW2d ___ (2008).

and small bowel resection was performed for infarcted gangrenous bowel. The decedent suffered postoperative complications, including multi-system organ failure and sepsis. After a lengthy stay in the intensive care unit, the decedent was transferred to another hospital. Nine months later, she died as a result of renal failure and urosepsis.

Plaintiff sent defendants a notice of intent to file suit. In Section II of the notice of intent, plaintiff stated that the applicable standard of care required Drs. Cooper and McDaniel to timely and properly:

- a. Perform a thorough and complete examination;
- b. Obtain a thorough and complete medical history;
- c. Avoid unnecessary surgical procedure, i.e., TAH and BSO;
- d. Implement conservative treatment, including but not limited to, further observation and/or Lupron therapy;
- e. Avoid injury to the bowel by excessive traction or packing;
- f. Adequately observe the abdominal contents prior to closure of the abdomen;
- g. Recognize the signs and symptoms of and [sic] ileus or bowel obstruction;
- h. Perform appropriate diagnostic testing to rule out an ileus or bowel obstruction including, but not limited to, an MRI, CT scan, lower GI series or abdominal x-rays;
- i. Consult with the appropriate specialists including, but not limited to, an Infectious Disease Specialist, General Surgeon and/or Gastroenterologist;
- j. Timely and properly diagnose and treat an ileus or bowel obstruction;
- k. Recognize the need for prolonged in-patient hospitalization, continued encouraged ambulation and the need for positive bowel movement; and
- l. Any and all acts of negligence identified through the course of discovery.

In addition to these standards applicable to the doctors, the notice of intent stated that defendant hospital was required to properly and timely “[s]elect, employ, train and monitor its employees . . . and or staff . . . to insure they were competent to perform adequate medical care” and to “[e]nsure that appropriate policies and procedures are adopted and followed, including, but not limited to, pursuing patient advocacy by following the chain of command where indicated. . . .”

The notice of intent alleged that defendants breached the applicable standard of care by their “failure to do the things required in [Section] II above.” The notice also referenced Section II in stating those actions that should have been taken to achieve compliance with the standard of care. With respect to the manner in which the breach was the proximate cause of the claimed

injury, the notice of intent stated: “Within a reasonable medical probability, had the standard of care been complied with in a timely and reasonable manner, [the decedent] would not have suffered severe and permanent damage and untimely demise.”

After plaintiff filed her complaint and affidavit of merit, defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff’s notice of intent failed to adequately state the manner in which it is alleged that the breach of the standard of practice or care was the proximate cause of the decedent’s injury, as required by MCL 600.2912b(4)(e). Defendants also argued that the statement of proximate cause in plaintiff’s affidavit of merit was deficient, but that is not at issue in this appeal. The trial court ruled that the notice of intent failed to provide a sufficiently detailed statement of proximate cause. We now affirm that ruling.

The statute of limitations for a malpractice action is two years. MCL 600.5805(6). For medical malpractice actions, a claimant must serve the potential defendant with a notice of intent to file suit at least 182 days before filing the complaint. MCL 600.2912b(1). If the statute of limitations would expire during the 182-day waiting period, the statute is tolled for the “number of days remaining in the applicable notice period after the date notice is given.” MCL 600.5856(c); *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5 n 4; 704 NW2d 69 (2005). Service of a defective notice of intent does not toll the limitations period. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002) (*Roberts I*).

MCL 600.2912b(4) sets forth the information that a notice of intent must contain:

The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
- (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

Courts recognize that a notice of intent is provided at the earliest stage of a medical malpractice proceeding, and therefore the notice need not be accurate in every respect. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004) (*Roberts II*). But a claimant must “make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings.” *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309,

320; ___ NW2d ___ (2008), quoting *Roberts II, supra* at 701 (emphasis in original). Regarding causation, it is not sufficient to merely state that the defendants' negligence caused an injury. *Roberts II, supra* at 699-700 n 16. "[N]o portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole." *Miller v Malik*, 280 Mich App 687, 696; ___ NW2d ___ (2008).

In *Boodt, supra*, the Court considered the sufficiency of the plaintiff's notice of intent with respect to the defendant doctor. At issue was the statement of proximate cause: "If the standard of care had been followed, [David] Waltz would not have died on October 11, 2001." *Id.* at 560. The *Boodt* Court concluded that this statement did not satisfy MCL 600.2912b(4)(e), even considering the notice of intent in its entirety:

This statement does not describe the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice," as required by MCL 600.2912b(4)(e). Even when the notice is read in its entirety, it does not describe the manner in which the breach was the proximate cause of the injury. When so read, the notice merely indicates that [the defendant] caused a perforation and that he then failed to do several things that he presumably should have done, such as perform a pericardiocentesis in a timely manner. However, the notice does not describe the manner in which these actions or the lack thereof caused Waltz's death. As this Court explained in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004) (*Roberts II*), "it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury."

Although the instant notice of intent may conceivably have apprised [the defendant] of the nature and gravamen of plaintiff's allegations, this is not the statutory standard; § 2912b(4)(e) requires something more. In particular, it requires a "statement" describing the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e). The notice at issue here does not contain such a statement. [*Boodt, supra* at 560-561 (Emphasis in original).]

Then, the *Boodt* Court reaffirmed its holding in *Roberts I, supra*, that a defective notice of intent does not toll the statute of limitations. *Boodt, supra* at 561-562. The Court rejected the plaintiff's argument that even if the notice of intent was defective and did not toll the statute of limitations, the filing of her complaint and affidavit of merit *did* toll the statute of limitations, by concluding:

[A] plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4). See *Roberts I*, 466 Mich at 64 (holding that the period of limitations is not tolled unless notice is given in compliance with all the provisions of § 2912b[4]). Because plaintiff's notice of intent here did not contain all the information required under § 2912b(4), she could not have commenced an action. Therefore, her complaint and affidavit of merit could not have tolled the period of limitations.

This case is distinguishable from *Kirkaldy [v Rim]*, 478 Mich 581; 734 NW2d 201 (2007)], because there the plaintiff presumably filed a notice of intent that satisfied 2912b(4)(e). We concluded that the plaintiff's subsequent filing of a complaint and an affidavit of merit, which was later determined to be defective, tolled the period of limitations until the affidavit's sufficiency was successfully challenged. In this case, however, plaintiff failed to file a notice of intent that satisfied the requirements of § 2912b(4)(e), and, thus, plaintiff was not yet authorized to file a complaint and an affidavit of merit. Therefore, the filing of the complaint and the affidavit of merit that plaintiff was not yet authorized to file could not possibly have tolled the period of limitations. [*Boodt, supra* at 562-564 (footnote omitted).]

Recently, this Court in *Miller, supra*, applied the *Boodt* holding to another wrongful death medical malpractice action in which the sufficiency of the proximate cause statement in the plaintiff's notice of intent was at issue. In *Miller*, the plaintiff's decedent suffered complications after undergoing a cervical discectomy, went into cardiac arrest and died of a pulmonary embolism from a deep vein thrombosis in his leg. *Id.* at 690-691. The plaintiff's notice of intent contained the following statement of proximate cause: "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis [DVT] would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism." *Id.* at 691. The trial court granted the defendants' motion for summary disposition, ruling that the information in the notice of intent did not satisfy § 2912b(4)(e). Because the statute of limitations had expired, the court dismissed the complaint with prejudice. *Id.* at 691-692.

This Court affirmed by concluding that the notice of intent was defective because it did not state the manner in which the numerous alleged breaches of the standard of care caused injury:

Although plaintiff stated that the DVT and Miller's subsequent death would have been avoided if the standard of care had been followed, nowhere did she state how any defendant failed to prevent, diagnose, or treat the DVT or pulmonary embolism. The reader is left to wonder whether plaintiff is alleging that the DVT could have been prevented, whether a diagnosis of the DVT could have been made in time to avoid the pulmonary embolism, or whether the pulmonary embolism could have been diagnosed or treated in time to avoid Miller's death. See *Roberts II, supra* at 699. Plaintiff identified many duties in the standard of care portion of the notice of intent, but she failed to describe the manner in which any failure on the part of any defendant to perform any of these duties caused Miller's DVT, pulmonary embolism, or death. [*Miller, supra* at 697.]

This Court detailed the information that it found lacking in the plaintiff's statement of causation in her notice of intent:

For example, plaintiff asserted that all defendants had a duty to recognize the signs and symptoms of a DVT. However, she never identified these signs or symptoms or stated which, if any, Miller exhibited or how recognition of them would have prevented Miller's pulmonary embolism or death. Similarly, plaintiff

never indicated how a history, physical examination, Doppler study, DVT prophylaxis, laboratory study, or alternative prophylaxes to TED hose would have prevented Miller's DVT, pulmonary embolism, or death. The notice of intent provides that all defendants had a duty to refer a patient with signs and symptoms of a DVT to the emergency room, but plaintiff failed to state what treatment might have been initiated or how emergency room personnel would have prevented Miller's pulmonary embolism or death. With respect to Henry Ford and Beaumont, plaintiff asserted that they had several duties regarding policies and procedures, but she failed to identify how any breach of these duties caused Miller's DVT, pulmonary embolism, or death. Reading the notice of intent as a whole and taking into account the duties listed in the standard of care portion, the reader cannot discern the manner in which any defendant's conduct or omission caused Miller's DVT, pulmonary embolism, or death. [*Miller, supra* at 697-698.]

The deficiency in failing to correlate the condition suffered to the conduct of any defendant "in any meaningful way" failed to sufficiently place defendants on notice of the nature of the claim. *Id.* at 699. Consequently, the *Miller* Court dismissed the litigation because an insufficient notice of intent does not toll the limitations period. *Id.* at 699-700.

Therefore, we must apply the *Boodt* decision to the notice of intent filed in this case. Although plaintiff's notice of intent lists numerous actions that were required of defendants, the notice does not provide a sufficient statement of causation linking the alleged breaches of the standard of care with the decedent's injuries. For example, the notice of intent states that defendants had a duty to perform a complete examination and obtain a complete medical history, but it does not state how the alleged failure to do so was the proximate cause of any injury. Nor does the notice of intent state how defendant's failure to implement Lupron therapy was the proximate cause of the decedent's bowel injury. Plaintiff states that defendants had a duty to avoid bowel injury by excessive traction or packing, but she does not indicate how these actions led to the decedent's development of ischemic bowel. Plaintiff alleges that defendants failed to recognize symptoms and perform diagnostic testing, but she does not state how their failure in this regard was the proximate cause of injury. Plaintiff does not indicate the symptoms that defendants should have recognized, or what diagnostic testing would have revealed. Also, the notice of intent states that defendants had a duty to consult with various specialists, but the notice does not state what treatment might have been started or how a specialist would have prevented the decedent's ischemic bowel or organ failure or sepsis, or her death from renal failure and urosepsis. Because the notice of intent does not specify the *manner* in which any of these alleged breaches of the standard of care caused the injury and death, the notice was not responsive to the information sought in § 2912b(4). *Boodt, supra* at 560. Accordingly, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood